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No. 95-1098

In The

Supreme Court of the United States

October Term, 1995

CARMINE CASELLA,

Petitioner,

v.

EQUIFAX CREDIT INFORMATION SERVICES and TRANS UNION CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION OF THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, THE NATIONAL CONSUMER LAW CENTER, THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS, U.S. PUBLIC INTEREST RESEARCH GROUP, CALIFORNIA PUBLIC INTEREST RESEARCH GROUP, MASSACHUSETTS PUBLIC INTEREST RESEARCH GROUP, THE NATIONAL CONSUMERS LEAGUE, AND BANKCARD HOLDERS OF AMERICA FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37.3 of the Rules of this Court, the National Association of Consumer Advocates, the National Consumer Law Center, the National Association of Consumer Bankruptcy Attorneys, U.S. Public Interest Research Group, California Public Interest Research Group, Massachusetts Public Interest Research Group, the National Consumers League, and Bankcard Holders of America hereby respectfully move for leave to file the attached brief *amici curiae* in this case. The consent of the attorneys for the petitioner has been obtained. The consent of the attorneys for the respondents was requested but refused or withheld.

The interest of the *Amici* in this case arises from their positions as among the leading and most active consumer rights organizations in this country and their particular involvement, past and present, in the enforcement of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t ("FCRA"). *Amici* respectfully suggest that it will be useful to the Court to consider their views, which focus in the attached brief on the adverse effect of the ruling below on the aspects of the FCRA separate from its impact on the consumer credit arena.

The FCRA is in fact much broader than a credit statute, and the positions expressed have not been addressed by the court below or the Petitioner. *Amici* contend that, among other things, the Second Circuit opinion, if allowed to stand, will impede private enforcement of the statute and will impair the ability of ordinary citizens to participate successfully in such endeavors as seeking employment, applying for a security clearance, renting an apartment, and many other common activities for which credit reports are used.

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INTEREST OF *AMICI CURIAE*

The National Association of Consumer Advocates ("NACA") is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, and law professors and students whose primary practice involves the protection and representation of consumers. Its mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and to serve as a voice for its members as well as consumers in the ongoing struggle to curb unfair and abusive business practices. From its inception, NACA has focused its efforts in the areas of fraudulent sales and unlawful banking practices, including abuses in the extension of credit and the collection of debts. Consistent with its goal of promoting justice for consumers in the credit arena, NACA has appeared as *Amicus Curiae* before a number of federal and state appellate courts, including last term, when NACA appeared as *Amicus Curiae* before this Court in *Heinz v. Jenkins*, 115 S.Ct. 1489 (1995), in support of the consumer's contention, adopted by the Court unanimously.

The National Consumer Law Center, Inc. ("NCLC") is a non-profit Massachusetts corporation, founded in 1969, specializing in consumer law issues, with an emphasis on consumer credit. Its primary focus and mission are the interests of low-income consumers. On a daily basis NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of eleven practice treatises and annual supplements

on consumer credit laws, including *Fair Credit Reporting Act*, 3rd ed. (NCLC 1995), and *Unfair and Deceptive Acts and Practices*, 3rd ed. (NCLC 1991, Cum. Supp. 1995), as well as bi-monthly newsletters on a range of topics related to consumer credit issues and low-income consumers. Since before passage of the Fair Credit Reporting Act, the fairness, accuracy, and disclosure of credit information about individuals have been of persisting concern to NCLC's low income clients.

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 500 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 100,000 bankruptcy cases filed each year. NACBA is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. Because many debtors have credit report problems which have developed due to difficult financial circumstances, NACBA has a significant interest in proper administration and enforcement of the Fair Credit Reporting Act.

U.S. Public Interest Research Group ("USPIRG") is the national lobbying office for state Public Interest Research Groups located in 31 states. State PIRGs are non-profit, non-partisan research and advocacy organizations with more than 500,000 members. USPIRG has published a series of reports highlighting the vast number of consumers affected by credit bureau inaccuracies. California Public Interest Research Group and Massachusetts Public Interest Research Group have been instrumental in passing stronger credit reporting laws in their states.

Through consumer complaint centers in Los Angeles, Washington, D.C., and Boston, these groups have assisted numerous consumers who have been victims of credit bureau inaccuracies.

The National Consumers League ("NCL"), founded in 1899, is America's pioneer consumer organization. NCL's three-pronged approach of research, education, and advocacy has made it an effective representative and source of informational for consumers and workers. NCL is a private, non-profit organization dedicated to representing consumers on issues of concern, including health care, food and drug safety, fair labor standards, telecommunications, and fraud.

Bankcard Holders of America ("Bankcard Holders") is a national, non-profit organization dedicated to consumer credit education and advocacy. Founded in 1980, Bankcard Holders has a current membership of more than 30,000 individual consumers. Bankcard Holders receives no financial support from the banking or credit industry. Instead, it relies on membership dues and publication sales. In addition to its bi-monthly newsletter reporting on credit industry practices and credit card opportunities, the organization has published and distributed nearly two dozen educational pamphlets for credit card consumers, including "Consumer Credit Rights" and "Credit Cards: What You Don't Know Can Cost You!"

ARGUMENT OF LAW

A. Introduction

The Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t ("FCRA" or "the Act"), was enacted in 1970 as Title VI of the Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1693r ("CCPA"), the plenary regulation by Congress of the national consumer credit industry. The decision below creates an irreconcilable split within the Circuits on the precise issue presented by the Petitioner, departs from the standards of statutory construction mandated by this Court in its prior teachings under the CCPA, and wreaks havoc with the CCPA's integrated and comprehensive statutory scheme. Accordingly, *Amici* urge this Court to grant the writ of certiorari in order to restore uniformity of interpretation and application of the FCRA by the lower federal courts and to re-establish the critical enforcement role of individual consumers acting as private attorneys general, as intended by Congress, in this vital sector of the national economy.

B. The FCRA is Part of the Integrated Regulatory Scheme Established by Congress to Insure That Credit Decisions Are Made on the Basis of Only Accurate and Reliable Information

The consumer credit industry has expanded over one hundred fold in the last fifty years and is now one of the largest sectors of the national economy. Growing from six billion dollars at the end of World War II, outstanding consumer credit debt rose to 116 billion dollars in 1970 when the FCRA was enacted and now has reached over 700 billion dollars. S. Rep. 103-209, 103d Cong., 1st Sess.

2-3 (1993). To support this phenomenal level of activity, the consumer reporting industry maintains 450 million credit files on more than 110 million individuals, virtually the entire adult population of the country, and processes almost 2 billion pieces of data per month. *Id.*, at 3. In view of the demonstrated potential for error in operating this informational maze, Congress explicitly recognized that the health of the consumer banking system is "dependent upon fair and accurate credit reporting" and that "[i]naccurate credit reports directly impair the efficiency of" that system. 15 U.S.C. § 1681(a)(1).

A recurring theme which is at the heart of the CCPA is that the dissemination of accurate credit information is essential to maintain the vitality of the credit granting system for the benefit of creditors and consumers alike. Just as Congress enacted the FCRA with the express purpose that credit grantors be in the best position to make reliable decisions with regard to whom to extend credit, the Truth in Lending Act, 15 U.S.C. §§ 1601-1667e, Title I of the CCPA ("TILA"), establishes the corresponding principle through its disclosure requirements that consumers are best served through their own "informed use of credit." 15 U.S.C. § 1601(a). In addition to the FCRA and TILA, Congress has included a further self-help checking mechanism within the CCPA as Title VII, the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f ("ECOA"), providing yet another information sharing standard through its core requirement that creditors disclose, and consumers receive, the specific reasons for any adverse action taken, such as credit denial. 15 U.S.C. § 1691(d).

The guiding principle of this congressional philosophy was succinctly summarized by this Court more than twenty years ago in its initial and seminal teaching under the CCPA: "[B]lind economic activity is inconsistent with the efficient functioning of a free economic system such as ours." *Mourning v. Family Publication Service, Inc.*, 411 U.S. 356, 364 (1973). Credit decisions made in ignorance or without the benefit and appreciation of accurate information, whether made by credit grantors or consumers, undermine the vitality of the consumer economy. Creditors who grant credit to over-extended consumers create inefficiency and added costs just as assuredly as do consumers who borrow money without the means to re-pay their loans.

C. The Credit Reporting System Remains Plagued By Inaccurate Information

Unfortunately, despite the intent and best efforts of Congress in adopting the FCRA, accurate information is not being consistently provided by the consumer reporting industry to its credit granting clientele. Nearly half of all consumer reports maintained by the three major credit bureaus (two of which are the Respondents in this case) contain inaccurate information. S. Rep. 103-209, *supra*, at 3. The staggering statistic that nearly 20% of the complaints filed with the Federal Trade Commission concern the consumer reporting industry, *id.*, is indicative of the extent to which ordinary citizens are frustrated and disappointed by having inaccurate information maintained in their credit reports. Reflecting the experience of the Petitioner here, 94% of these complaints are in regard to

uncorrected errors, and 16% state that "corrected" errors subsequently re-appeared. *Credit Bureaus: Public Enemy #1 at the FTC*, The Public Interest Research Groups (October 1993). Consumers filing these complaints spend an average of 23 weeks dealing directly with the reporting agency to resolve their dispute, and 63% of the complainants have had five or more contacts with the reporting agency before seeking assistance from the FTC. S. Rep. 103-209, *supra*, at 6.

The successful operation of the consumer credit system is a key factor in the performance of the national economy and in the ability of all citizens to enjoy the fruits of this country's material prosperity, the envy of the rest of the world. Failure within this system, on the other hand, is expensive and is largely defined by the rate of consumer default, with its resulting abuses and significant personal toll ["bankruptcies, marital instability, loss of jobs, and invasions of individual privacy" (15 U.S.C. § 1692(a))], which Congress has sought to prevent and deter through enactment of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692o, Title VIII of the CCPA ("FDCPA"). Despite the extraordinary economic and personal benefits at stake, *Amici*'s experience is that the consumer credit system is currently operated with far too little regard for the price of failure or the mandates imposed by Congress to cure its shortcomings.

D. The Second Circuit Decision Here is Directly Counter to the Policy of Disclosure and Reporting of Accurate Information

The decision below has turned the FCRA into a disinformation statute, in direct contravention of Congress' will. The decision establishes as normative behavior within the industry, and in fact as a requirement of enforcing the FCRA, that credit reports be distributed with known inaccuracies and that credit decisions must be made on that basis. The major problem which Congress identified in enacting the FCRA is inaccurate information within the consumer credit system, and its primary solution adopted throughout the CCPA is to eliminate erroneous data. Ironically, the Second Circuit has now directed that erroneous credit reports must be disclosed to a potential creditor and acted upon in order for a consumer to cure the very inaccuracies that Congress has required should be eradicated before a credit application is even evaluated. *See*, 15 U.S.C. § 1681e(b).

The Respondents are reporting agencies, not credit grantors, a fact which necessarily has influenced the position which they have taken throughout this litigation. Specifically, they have urged the courts below to adopt a requirement that credit reports can be submitted to creditors with known inaccuracies. The Respondents have ignored both the cost to the credit industry of being provided erroneous information on which to evaluate a consumer's credit worthiness and the salutary and preventive role that consumers have been afforded by Congress through the Act to ensure accurate credit-granting decisions. As conduits of information and not credit extenders, the Respondents share none of the financial

risk inherent in the ultimate decision to approve a credit application. Their self-interest coincides with that of neither credit grantors nor consumers.

E. The Decision Below Impairs the Primary Enforcement Mechanism Established by Congress to Maximize the Informed Use of Credit By Both Consumers and Creditors

A second recurring theme of the CCPA is the recognition by Congress of the limitations of the public sector in policing its enforcement. The two federal agencies charged with primary responsibility for administering this law, the Federal Trade Commission and the Federal Reserve Board, simply do not have the ability or resources to monitor or manage the entirety of this nation's consumer credit economy. The individual consumers whose lives are disrupted by unlawful credit practices, however, are painfully aware when and where credit abuses occur, are individually and personally affected by them, and are therefore uniquely motivated and equipped to compel industry to comply with its statutory responsibilities.

Accordingly, each of the referenced Titles of the CCPA contains the essential provision effectuating Congress' preference that enforcement of the law be undertaken by aggrieved consumers acting as private attorneys general. 15 U.S.C. § 1640(a) (TILA); 15 U.S.C. §§ 1681n and 1681o (FCRA); 15 U.S.C. § 1691e(d) (ECOA); 15 U.S.C. § 1692k(a) (FDCPA); *see, e.g.*, S. Rep. 95-382, 95th Cong., 1st Sess., 5, *reprinted in* 2 U.S. Code Cong. & Admin. News 1695, 1699 (1977) (FDCPA) ("The committee

views this legislation as primarily self-enforcing; consumers who have been subjected to collection abuses will be enforcing compliance."). The Federal Trade Commission itself has recognized the extent of its inability to assure accuracy in 450 million credit files by acknowledging that the FCRA "was designed to be largely self-enforcing" and has expressed its position directly to Congress that any amendments to the Act maintain "the capacity of consumers to bring private actions to enforce their rights under the statute." S. Rep. 103-209, *supra*, at 6.

To assist in this private policing effort, the FCRA contains several provisions which assure that consumers are permitted to know the contents of their credit files and establish a comprehensive system for investigating, re-investigating, and correcting inaccurate or incomplete information. 15 U.S.C. §§ 1681d, 1681e, 1681g, 1681h, 1681i, 1681j, 1681*l*, and 1681m. Indeed, virtually the entirety of the Act is designed to provide consumers with the means to effectuate this aspect of Congress' intent, and most of these provisions are designed to be prophylactic in operation, permitting the consumer to act proactively to correct inaccurate information before applying for credit.

The decision below effectively cripples the Act's private enforcement mechanism. The Second Circuit opinion holds that a consumer such as the Petitioner here, who made every effort available under the Act to compel Respondents to correct demonstrably and objectively false data, may not employ the established procedure of last resort – judicial intervention – without having first taken the futile and in fact self-destructive step (*see* Section F, *infra*) of applying for credit and being turned

down. Significantly, §§ 1681n and 1681o do not explicitly provide for injunctive relief, and the only prospective remedy for unlawful credit reporting is a suit for damages. The plain legislative intent is that a successful suit under the FCRA has the effect of compelling future compliance, yet the decision below removes that remedy and leaves entire sections of the Act little more than precatory language.

F. The Decision Below Ignores the Directive From This Court That the Judiciary Refrain From Interfering With the CCPA's Comprehensive Regulatory Scheme Through Creative Judicial Interpretation

Clearly, the Second Circuit went beyond the language employed in the FCRA to reach its result. It cited no authority in support of its holding, and as stated by the Ninth Circuit in reaching the opposite conclusion, there is no authority whatsoever "stating that a denial of credit, and not mere credit inaccuracies, are necessary for recovery under FCRA." *Guimond v. Trans Union Credit Information Company*, 45 F.3d 1329, 1333 (9th Cir. 1995).

Not only is credit denial not a prerequisite for maintaining suit under the Act, but, as discussed above, the majority of its provisions are founded on the congressional determination that both consumers and creditors must have accurate information before making and evaluating a credit application. The decision below therefore undermines the structure and balance of the FCRA and eliminates one of the most important means chosen by Congress to assure that credit is granted when deserved

and denied when not. The net effect, at least within the jurisdiction of the Second Circuit, is that national policy as set by Congress to maintain the strength and health of the consumer credit industry has been judicially altered.

This Court stated sixteen years ago, specifically in the context of the CCPA, that the federal judiciary is ill equipped to substitute its judgment through statutory interpretation for the legislative decisions made by Congress: "[J]udges are not accredited to supersede Congress or the appropriate agency by embellishing upon the regulatory scheme." *Ford Motor Credit Company v. Milhollin*, 444 U.S. 555, 565 (1980). The danger of such judicial activism is vividly illustrated here, where the Second Circuit's necessarily limited view of the case before it prevented it from considering, let alone evaluating, the impact that its departure from the statutory language would have on the intricate and interdependent provisions of the FCRA in particular and the CCPA in general.

For example, the Second Circuit clearly was unaware that imposing a new requirement that aggrieved persons must first apply for credit and be turned down before invoking the civil liability remedy of the FCRA is to insist that applicants affirmatively harm their credit profiles. The credit industry considers the number of previous credit applications appearing in a credit report as negative information in evaluating credit worthiness. Federal Trade Commission Staff Letter, Division of Credit Practices, David G. Grimes, Jr., August 1, 1994; *accord, Palmiotto v. Bank of New York*, 1989 WL 114156 (N.D.N.Y. 1989). One of the paradoxes created by the decision below is that a consumer who knows that a creditor will be provided inaccurate information which can form the

basis for adverse action must add the additional burden of an apparent credit denial to an already negative credit report.[1] Creating additional damages in an FCRA suit should not be either the goal or effect of judicial interpretation. The decision below unfortunately achieves this result, while at the same time preventing the FCRA from performing as intended "to assure maximum possible accuracy of information." 15 U.S.C. § 1681e(b).

Another inadvertent result of the decision below is to foster the granting of credit to applicants who are not entitled to it. *Amici* are all too aware of the consequences of credit over-extension and the heavy toll that the improvident granting of credit takes on the most vulnerable members of society, as is Congress. 15 U.S.C. § 1692(a). As discussed above, the dissemination of inaccurate information benefits no one, consumer, creditor, or society at large. Nevertheless, the decision below encourages, and indeed requires, that credit reports be published with known inaccuracies. Some inaccuracies, such

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[1] To be precise, an excessive number of prior inquiries showing in a credit report is treated by the industry as a negative factor in evaluating credit worthiness. *See*, 15 U.S.C. § 1681g(a)(3) (establishing protocol for disclosing inquiries). While an inquiry by itself does not necessarily translate into a credit denial, a credit report showing an inquiry without a corresponding account with the inquiring creditor does increase the possibility that a credit application was made and rejected. Industry considers excessive inquiries as an indication that "consumers may be overly anxious to obtain credit or that they are about to become overextended." FTC Staff Letter, *supra*, at 2. Thus, as a consequence, the mere fact that multiple inquiries have been made remains a disqualifying factor.

as wrong or incomplete information identifying the applicant, result in creditors granting credit to individuals who do not meet prevailing standards of credit worthiness. Thus, in some instances where the Second Circuit now has required that inaccurate credit reports be submitted, credit may actually be granted, to the detriment of all concerned.

The critical point is that the decision below eschews the language and framework of the FCRA, and therefore the considered judgment of Congress, in favor of the panel's view of how the Act should work. This Court has warned of the perils of that methodology, which, as predicted, have now come to fruition.

G. The Adverse Consequences of the Decision Below Are Not Limited to the Consumer Credit Industry

Since this case has arisen in the context of a consumer credit dispute, it is only natural that the court below limited its analysis to that sphere. Nevertheless, the FCRA is not so narrow, with its coverage extending to all other situations in which credit reports are used: employment, insurance, governmental licensing, in response to court order, and in any other circumstance where there is "a legitimate business need for the information in connection with a business transaction involving the consumer." 15 U.S.C. § 1681b.

As onerous as it is to require an individual to be turned down for credit before being able to seek to compel a reporting agency to provide accurate information, imposing a pre-condition of adverse action in these other

areas is no less than pernicious. A small sampling of the typical and regular uses for which credit reports are generated includes seeking a job, applying for a security clearance, renting an apartment, applying for insurance, or proving financial responsibility in a child custody dispute or to be appointed by a court as a relative's guardian. The decision below applies equally to these endeavors and many others where delay or denial literally can ruin a life. Congress was aware of the extent to which credit reports are used in this country and knew the importance to every citizen of being able to correct errors before publication. The Second Circuit, apparently unwittingly, has ignored this aspect of the FCRA, with consequences of immeasurable harm.

The imposition by the Second Circuit of its requirement that a consumer must first be subjected to adverse action in order to maintain suit to correct reporting errors also ignores the different treatment under the FCRA for adverse action in the credit, employment, and insurance areas and all others. Specifically, § 1681m requires the consumer to be notified of adverse action and of the identity of the credit reporting agency making the report only in the context of credit, employment, and insurance, leaving the consumer uninformed of the fact or impact of inaccurate information in a credit report used for other purposes. Thus, in those circumstances, the decision below creates an intolerable Catch 22, where persons who know of erroneous information in their credit reports cannot correct the information until they show that the information has led to adverse action of which, by virtue of § 1681m, they are unaware.

Another example of the unintended consequences of the Second Circuit decision is to cause consumers with uncorrected errors in their credit reports to be treated less favorably with regard to the marketing initiatives generated by the recent innovation of credit report "prescreening." "Prescreening" is a cooperative process between credit reporting agencies and direct marketers where the "agencies use their files to create and sell lists of consumers who meet specifications provided" by the marketers "for general direct marketing solicitations not initiated by the consumer." S. Rep. 103-209, *supra*, at 3-4. A consumer such as the Petitioner, whose report erroneously listed thousands of dollars of outstanding debt but who was denied the right to have that information corrected in accordance with the Act, is placed in a position of being offered higher priced products and being denied ready access to lower priced goods and services, which are made available in accordance with the characteristics appearing in the existing credit reports. If the decision below is allowed to stand, such a consumer would never know of the adverse consequences proximately caused by the erroneous report and would be denied the prescreening benefits offered to all other qualified consumers, yet would not be able to compel the reporting agency to correct the credit file as mandated by the Act.

CONCLUSION

Amici respectfully urge that the writ of certiorari be granted to correct this misguided result and to resolve the split within the Circuits on this important question of national policy and federal statutory construction.

Respectfully submitted,

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